

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the proposed adoption of)	NOTICE OF PUBLIC HEARING
NEW RULES I through IV regarding)	ON PROPOSED ADOPTION
mortgage lender surety bond, branch)	
office licensing, supervision of branch)	
offices and loan officers, and)	
responsibility for acts of agents)	

TO: All Concerned Persons

1. On May 29, 2008, at 9:00 a.m., a public hearing will be held in Room 342 of the Park Avenue Building, 301 S. Park, Helena, Montana, to consider the proposed adoption of the above-stated rules.

2. The Department of Administration, Division of Banking and Financial Institutions, will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Division of Banking and Financial Institutions no later than 5:00 p.m. on May 22, 2008, to advise us of the nature of the accommodation that you need. Please contact Christopher Romano, Division of Banking and Financial Institutions, P.O. Box 200546, Helena, Montana 59620-0546; telephone (406) 841-2928; TDD (406) 444-1421; facsimile (406) 841-2930; e-mail to cromano@mt.gov.

3. The proposed new rules provide as follows:

NEW RULE I MORTGAGE LENDER SURETY BOND (1) Every applicant for a mortgage lender license shall file with the department a bond as specified in (3) during the period of licensure. Each surety bond shall be subject to the filing of a claim for acts during the term of the bond for a period of five years.

(2) In no less than five years after a person ceases to be licensed as a mortgage lender, the writer of the surety bond may apply to the commissioner on forms approved by the department for release of the surety bond. Unless the commissioner determines that claims are pending against the person for violation of the Montana Residential Mortgage Lender Licensing Act, the commissioner shall release the surety bond.

(3) A surety bond shall be in a form and on terms approved by the commissioner in the minimum sum of \$50,000 for each principal office and \$5,000 for each branch office authorized to do business in this state. The surety bond shall be renewed or replaced annually.

AUTH: 32-10-303, 32-10-502, MCA

IMP: 32-10-203, 32-10-207, 32-10-208, 32-10-209, 32-10-303, 32-10-502,
MCA

STATEMENT OF REASONABLE NECESSITY: The Residential Mortgage Lender Licensing Act (Act) requires all licensees to continuously maintain a surety bond, which may be used for the recovery of expenses, fines, and fees levied by the department for losses or damages incurred by borrowers or consumers as a result of the licensee's noncompliance with the Act. The division believes that the proposed amount of \$50,000 for the mortgage lender entity principal office license and \$5,000 for each branch office license will be sufficient to meet the requirements set forth by 32-10-303(1)(b), MCA. The division chose these amounts because it was concerned that the amount should be large enough to protect borrowers from the actions of mortgage lenders that result in harm to borrowers. Yet, at the same time, the division is aware that Montana is a small market and if the division sets the bond requirement too high, some lenders will choose not to do business in Montana instead of complying with the bonding requirement. The division seeks to protect borrowers, but does not want to stifle business in this state by setting unrealistically high bonding requirements. The division believes that this rule accomplishes both objectives.

The division proposes to have the bond remain in effect for five years after the period of licensure. This is because it may take several years after a mortgage lender closes its doors for actions against the lender to proceed through the court system. Borrowers are entitled to be reimbursed for the harm caused to them by the lender while it was in existence. The division chose five years because that is the period of time for which mortgage lenders must retain their records in 32-10-310, MCA.

The division estimates that there will be 125 mortgage lenders, including 350 branches that will apply for licenses on or before October 1, 2008. The cost of maintaining a surety bond will be at the expense of the licensees. This cost will be established by insurance companies that will offer this product. The estimated cost of the surety bond is not known to the division.

NEW RULE II BRANCH OFFICE LICENSING (1) In the event a mortgage lender desires to operate a branch office as defined in 32-10-103, MCA, the licensee must submit an application and the licensing fee specified in 32-10-202, MCA, and provide the following information on the original license application form, or upon an amendment to the original application, at least 30 days before the branch commences operation:

- (a) the physical address of each branch office, the mailing address if different, and the telephone number, e-mail address, and facsimile number;
- (b) the information required pursuant to this rule regarding the branch supervisor who will supervise the activities of loan officers employed by the branch to ensure compliance with all applicable rules and regulations; and
- (c) upon satisfaction of the requirements listed in (1)(a) and (b), a separate branch office license will be issued by the commissioner for posting in the branch office location as allowed by 32-10-203, MCA.

AUTH: 32-10-203, 32-10-502, MCA

IMP: 32-10-103, 32-10-202, 32-10-203, 32-10-207, 32-10-208, 32-10-301, 32-10-401, 32-10-402, 32-10-403, 32-10-404, 32-10-405, 32-10-406, 32-10-501, 32-10-512, MCA

STATEMENT OF REASONABLE NECESSITY: The division is proposing New Rule II to make it clear that each branch office must be licensed separately as required by 32-10-203, MCA. The division will require the applicant to provide the physical address, phone number, e-mail address, and facsimile number of each branch office in addition to the mailing address of the branch. This is because under the Montana Mortgage Broker and Loan Originator Licensing Act, the division has seen mortgage broker entities attempt to license an individual working out of their home as a branch, or claim that a hotel room is a branch location. The division seeks to ensure that licensees are providing actual branch locations.

The division is seeking to require the licensee to properly supervise each branch location for two reasons. First, under the Act the licensee is responsible for the actions of its employees at all of its locations including branches. Second, the division will not allow net branching in Montana. Net branching is an arrangement whereby a mortgage lender takes on an existing separate mortgage company and allows that separate entity to originate loans under the licensee's license. The Act requires a license to comply with all the provisions of Title 31, chapter 10, MCA, directly and indirectly through its employees. If a mortgage lender wants to establish a branch, it may do so as long as it maintains control and responsibility for the actions of its employees at that branch. A licensee may not disclaim responsibility for the actions of the employees or independent contractors at one of its branches.

This rule has been drafted to require the branch applicant to comply with the rule in order to receive a separate branch office license which must be posted in the branch office location.

NEW RULE III SUPERVISION OF OFFICES AND LOAN OFFICERS

(1) For purposes of this rule:

(a) "Loan officer employed by the licensee" means every individual operating under the authority of the licensee's license, regardless of whether the individual is an employee of the licensee or purports to act as an agent or independent contractor for the licensee.

(b) "Supervisor" means a partner, officer, branch manager, or other experienced person with management or supervisory responsibilities who is an employee of the licensee.

(2) Each principal office and branch office shall be supervised by the licensee to ensure compliance with the Montana Residential Mortgage Lender Licensing Act. The licensee must diligently supervise and control every loan officer of the licensee who is or should be licensed in Montana.

(3) To diligently supervise and control a loan officer employed by the licensee, the licensee shall:

(a) establish, maintain, and enforce written procedures to supervise the activities of loan officers employed by the licensee and other associated persons that are subject to its supervision and to supervise the operation of each office of the licensee transacting loans with Montana consumers. The procedures shall be

reasonably designed to achieve compliance with applicable Montana and federal lending laws and rules, including the Montana Residential Mortgage Lender Licensing Act;

(b) review the activities of each office transacting loans with Montana consumers, which shall include the examination of open and closed customer loan files. The reviews shall be reasonably designed to assist in detecting violations of, preventing violations of, and achieving compliance with applicable mortgage lending laws and rules, as well as detecting and preventing irregularities or abuses. Each mortgage lender shall retain a record of the dates and findings of each review. The duties of this rule may be delegated to a qualified supervisor;

(c) provide a copy of the procedures required by this rule to every loan officer employed by the licensee in printed or electronic format;

(d) ensure that loan officers obtain training to address deficiencies identified by the licensee in loan file and operations reviews; and

(e) establish procedures for handling consumer complaints and develop procedures to identify the types of consumer complaints that must be forwarded to a supervisor for review. Complaints that must be forwarded to a supervisor include complaints about material changes in loan terms, fees, or expenses, or material omissions about loan terms, fees, or expenses. The licensee shall also develop procedures for investigating, responding to, and keeping a record of complaints forwarded to a supervisor.

(4) In establishing the procedures in (2) and in determining the frequency of office reviews, the licensee shall consider the following:

(a) the number of loan transactions made by the licensee;

(b) the number of office locations transacting loans with Montana consumers;

(c) the number of affiliated persons assigned to each location;

(d) the nature and complexity of the loan transactions that the licensee predominantly makes;

(e) the number of loan officers assigned to a location;

(f) the number of loan officers assigned to the supervision of an individual supervisor; and

(g) the results of previous office reviews.

(5) In establishing the procedures in (2) and in determining the number of files from each loan officer to be reviewed, the licensee shall consider the following:

(a) the knowledge and years of lending experience of a loan officer;

(b) the disciplinary history of and the number of complaints received about a loan officer;

(c) the experience and level of sophistication of the borrowers of a loan officer, if specific segments of society are targeted as customers by the loan officer or licensee;

(d) the nature and complexity of the loan transactions that the licensee predominantly makes; and

(e) the results of previous file reviews for a particular loan officer.

(6) The licensee is subject to disciplinary action for any violation of the Montana Residential Mortgage Lender Licensing Act or corresponding rules committed by a loan officer employed by the licensee, whether or not that accountability is documented in any written agreement.

AUTH: 32-10-207, 32-10-502, MCA

IMP: 32-10-103, 32-10-202, 32-10-203, 32-10-207, 32-10-208, 32-10-301, 32-10-401, 32-10-402, 32-10-403, 32-10-404, 32-10-405, 32-10-406, 32-10-501, 32-10-512, MCA

STATEMENT OF REASONABLE NECESSITY: The division is proposing New Rule III to ensure that licensees have in place an individual who is responsible for supervising each branch office. Since mortgage lending is a complex area and lenders are responsible for compliance with state and federal laws, it is incumbent on the lenders to have in place procedures regarding supervision of its employees and independent contractors. Those policies should include actual reviews of loan files for compliance with all applicable laws, rules, and regulations. If deficiencies are found, there must be procedures in place to ensure that deficiencies are corrected and that loan officers are adequately trained. The procedures should also be in place for handling customer complaints and determining which customer complaints should be forwarded to supervisors for investigation, response, and recording. The licensee is at liberty to establish the procedures that work for them as long as they take into account the factors listed in (3) and (4) of the rule. The last section of the rule is a restatement of 32-10-501, MCA, which allows the division to impose civil penalties against the licensee and suspend or revoke the licensee's license for actions directly by the licensee or indirectly through an officer, director, partner, trustee, employee, or representative. The Act licenses only entities, but makes the entity responsible for the actions of its officers, directors, partners, trustees, employees, and representatives. Without strong internal controls in place, licensees will not be able to adequately supervise their employees in order to remain compliant under the Act.

NEW RULE IV RESPONSIBILITY FOR ACTS OF AGENTS (1) A licensee is responsible for the acts and omissions of its officers, directors, partners, trustees, employees, and representatives, including independent contractors in the conduct of the licensee's business.

AUTH: 32-10-207, 32-10-502, MCA

IMP: 32-10-103, 32-10-207, 32-10-208, 32-10-401, 32-10-402, 32-10-403, 32-10-404, 32-10-406, 32-10-512, MCA

STATEMENT OF REASONABLE NECESSITY: The division is proposing New Rule IV to ensure that licensees understand that they are responsible for the acts of their agents. Section 32-10-501, MCA, allows the division to impose civil penalties against the licensee and suspend or revoke the licensee's license for actions directly by the licensee or indirectly through an officer, director, partner, trustee, employee, or representative. The Act licenses only entities, but make the entity responsible for the actions of its officers, directors, partners, trustees, employees, and representatives. Section 32-10-207, MCA, makes the entity responsible for acts of independent contractors as well as employees. It is common in the mortgage lending brokering industries to see companies hire independent

contractors because of the tax and benefit advantages of independent contractors to the entity. Regardless of status of the individual as an employee or independent contractor, the entity is still responsible for his acts and omissions under the Act.

4. Concerned persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Kelly O'Sullivan, Legal Counsel, Division of Banking and Financial Institutions, P.O. Box 200546, Helena, Montana 59620-0546; faxed to the office at (406) 841-2930; e-mailed to kosullivan@mt.gov, and must be received no later than 5:00 p.m., June 6, 2008.

5. Kelly O'Sullivan, Legal Counsel, Division of Banking and Financial Institutions, has been designated to preside over and conduct the hearing.

6. An electronic copy of this proposal notice is available through the department's web site at <http://doa.mt.gov/AdministrativeRules.asp>. The department strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

7. The Division of Banking and Financial Institutions maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this division. Persons who wish to have their name added to the mailing list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding division rulemaking actions. Such written requests may be mailed or delivered to Christopher Romano, Division of Banking and Financial Institutions, 301 S. Park, Ste. 316, P.O. Box 200546, Helena, Montana 59620-0546; faxed to the office at (406) 841-2930; e-mailed to cromano@mt.gov; or may be made by completing a request form at any rules hearing held by the department.

8. The bill sponsor notice requirements of 2-4-302, MCA, apply and have been fulfilled. Representative Walter McNutt, the primary bill sponsor of HB 69 (2007), was notified on July 27, 2007, by U.S. mail.

By: /s/ Janet R. Kelly
Janet R. Kelly, Director
Department of Administration

By: /s/ Denise Pizzini
Denise Pizzini, Rule Reviewer
Department of Administration

Certified to the Secretary of State April 28, 2008.